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Clerk

IN THE

Supreme Court of the United States

No. 240

FRANK WOLIN, ET UX.,
Petitioners,

v.

ZENITH HOMES, INC., and NATHAN GOLDBERG,
Respondents.

Petition for Writ of Certiorari to the Court of Appeals of the State of Maryland

---

FRANK WOLIN
LINDA WOLIN
WALTER J. CAHILL
710 Dupont Circle Bldg.
Washington 6, D. C.

HANSELL K. PIESLEY
927 15th Street, N.W.
Washington 5, D. C.
Counsel for Petitioners

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Frank and Linda Wolin, pray that a writ of certiorari be issued to review the final judgment of the Court of Appeals of the State of Maryland, in the matter of *Frank Wolin, et ux* v. *Zenith Homes, Inc., et al.*, No. 81, September Term 1958, on the docket of that Court, in which the opinion was issued February 13, 1959, Motion for Reargument filed March 11, 1959, and denied March 13, 1959.

OPINIONS BELOW

The original decree of the Circuit Court for Montgomery County, Maryland, dated April 21, 1958 (R. 111, et seq.), and the opinion of the Court of Appeals of the State of Maryland, filed February 13, 1959 (R. 121, et seq.), are contained in the transcript of the record and the latter is printed in Appendix A of this Petition. Motion for Reargument was filed March 11, 1959, and denied March 13, 1959 (R. 139).

An Order of this Court, dated June 11, 1959, extended the time within which to petition for writ of certiorari to and including July 24, 1959.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under the provisions of Title 28, U.S.C., Section 1257(3), which is applicable to petitions for writs of certiorari with respect to final judgments of State courts where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Courts of Maryland abused their discretion when the Chancellor failed to rule on a demurrer submitted to him September 13, 1956, for six months, lacking one week, to wit, until March 8, 1957 (R. 141); and when he failed to issue a decree in the case submitted to him January 28, 1958, for three months, lacking one week, to wit, until April 21, 1958, in contravention and derogation of the Constitution of the State of Maryland, Article IV, Section 23, and Rule 18(b) of the Maryland Rules of Procedure, which provide such matters shall be settled within two months; which actions were affirmed by the Maryland Court of Appeals, thus depriving petitioners of a privilege and denying them the due process of the laws guaranteed them by Section 1 of the Fourteenth Amendment of the Constitution of the United States?

2. Whether the Courts abused their discretion when the Chancellor decreed "* * * they (plaintiffs) would be entitled to recover damages against defendants * * *", but dismissed the petitioners' bill with costs, which decree was affirmed by the Maryland Court of Appeals, contrary to the provisions of Rule 515(a), Maryland Rules of Procedure, which provides the plaintiff shall not be

non-suited or the action dismissed, particularly in view of the uncontradicted testimony of the only qualified expert in the field of construction that it would cost at least $10,000 to determine and correct the defects; and whether the petitioners were discriminated against inasmuch as the law was established and heretofore interpreted by the Court of Appeals of Maryland that the Chancellor abused his discretion in dismissing a bill in equity instead of transferring it to the law side of the Court, thus depriving petitioners of the equal protection of the laws within the meaning of Section 1 of the Fourteenth Amendment of the Constitution of the United States?

3. Whether the Court of Appeals of the State of Maryland decided this case, not in accord with applicable decisions of this Court, when it held petitioners could not seek rescission (R. 129, 132), although fraudulent representations concerning concealed circumstances were unknown to petitioners on April 14, 1955?

4. Whether the Court of Appeals of the State of Maryland decided this case, not in accord with applicable decisions of this Court, when it failed to presume that respondents failure to call, or to explain the absence of, their exclusive agent concerning uncontradicted evidence of four witnesses, that the testimony of the exclusive agent would have been unfavorable to the respondents, and corroborative of the testimony of petitioners and their witnesses? (R. 11, 31, 48, 55)

5. Whether the petitioners were denied due process of law guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States by the decision of the Court of Appeals of Maryland, which decided "they (plaintiffs) declined an award of damages and abandoned their claim (R. 126), while the record states the Chancellor only "suggested to plaintiffs that they bring suit provided they felt they had an adequate remedy at law" (R. 119); that at that time, the Statute of

Limitations had apparently run against a new action by the plaintiffs; that at law, only the alleged corporation could be sued; that the defendants stipulated the corporation was without any assets (R. 75); and it had held no election of officers or directors, nor directors' meetings since November 1954? (R. 85, 87)

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States, which reads as follows, is involved:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S.C., Const. Amend., Part 3, p. 2.)

STATEMENT OF THE CASE

The petitioners, looking around to purchase a new home in December of 1954, or January 1955, visited the subdivision known as Carroll Springs, Montgomery County, Maryland, at the request, and in the company of one Robert H. Kuntz, a salesman for Leo. A. Bryer, trading as Leo A. Bryer & Co. (R. 11, 57, 91), a licensed real estate broker in Montgomery County, Maryland, and the exclusive agent for sale of the houses in this subdivision. (R. 79, 85, 97)

After being shown several houses, petitioners were shown 2219 Westview Drive, then in the course of construction (R. 55, 91). Several days later, petitioners, their daughter, and two neighbors returned to premises 2219 Westview Drive. They were there met by a man who

introduced himself as Mr. Nathan Goldberg, who stated he was the owner of the subdivision and the builder of the houses therein. (R. 14, 49, 57) On this occasion Mr. Goldberg represented to petitioners that the land in the rear, for 300 feet from the rear line of the lot, was owned by the State, and would always be an open area. (R. 12, 31, 51, 57, 95) Several visits ensued while the premises were still in the course of being finished, all masonry and structural work having been completed. (R. 27, 93) During these visits, Mr. Goldberg and Mr. Kuntz represented that the concrete slab was underlaid by a course of gravel, that the foundation walls were dry and water-proofed (R. 12), and that the house was being built in strict conformity with the building regulations of Montgomery County. (R. 60)

On the evening of February 10, 1955, the dwelling being still unfinished, (R. 12, 24, 35, 93, 94, 97) Mr. Leo Bryer came to petitioners' home in Washington, D. C. in the company of Mr. Louis Rudden, a licensed real estate broker, who had referred petitioners to Mr. Leo Bryer, and presented a proposed agreement to purchase said premises (R. 13, 32).

The contract as presented to petitioners set forth Zenith Homes, Inc. as the owner of the premises. Petitioners had never seen, either in the subdivision or in the advertising matter, any reference to Zenith Homes, Inc., and refused to sign the contract since they were unaware of the existence of Zenith Homes, Inc., its financial status, stability or reputation, and would not deal with unknown corporations in the business of building dwellings. (R. 13, 14, 31, 33, 51, 59, 68, 71)

Mr. Bryer made a series of representations to the petitioners on this occasion, as set forth in the bill of complaint, paragraphs 2, 4 and 5 (R. 97, 98). Relying upon the statements of Nathan Goldberg and these representations and inducements of Mr. Bryer, the petitioners signed

the agreement to purchase fully believing that Zenith Homes, Inc. was the alter ego of Nathan Goldberg. (R. 22, 23, 32, 57, 58, 71)

The agreement to purchase specifically set forth that the house was incomplete at the time the agreement was signed and extended certain guarantees of future performance on the part of the respondents. (R. 15, 16, 61, 93)

On March 10, 1955, at the request of the exclusive agent, the petitioners made settlement at the Mutual Title Company in Washington, D. C., placing in escrow $22,950, however, instructing the escrow agent to neither release the fund nor record the deed until further written assurances were provided by the respondents that the terms of the agreement and the unfinished work would be properly completed. (R. 15, 32, 61)

Petitioners moved into the dwelling shortly thereafter and called, on a number of occasions, upon the respondents to fulfill unperformed conditions, to no practical avail. Finding respondents unable or unwilling to perform their agreement, petitioners sought professional advice and transmitted the recommendations therefrom received to the respondents April 14, 1955 (Plaintiffs' Ex. 47, R. 119). These recommendations were ignored and petitioners thereafter began an investigation of the representations made by respondent Nathan Goldberg and his exclusive agent. As a result, petitioners discovered the property in the rear was privately owned (R. 13, 24, 95), there had been no gravel placed under the basement and garage slabs at the time the agreement to purchase was signed, that substandard materials were used in the construction, that Montgomery County building regulations were violated, and that structural defects were developing from time to time (R. 37, 39, 40) which were not, as "Everybody knows, a new house, . . . is never

perfect in construction but has the anticipated defects inherent to its period." (R. 117)

On April 21, 1955, petitioners gave written notice to respondents of their intention to seek rescission of the contract (Plaintiffs' Ex. 48, R. 119), offering to reconvey the premises and seeking reimbursement for their investment and expenses.

Petitioners received no response to this demand and, on August 26, 1955, filed their bill in equity in the Circuit Court for Montgomery County, Maryland, seeking rescission of the contract of sale, cancellation of the deed, recovery of their investment and expenses due to the fraud and misrepresentations on the part of the vendor and the exclusive agent, and for such other and further relief as to the court seemed appropriate. (R. 141) Demurrer was sustained with leave to file an amended bill, which bill was filed March 28, 1956. (R. 141) Demurrer thereto was filed April 5, 1956, (R. 141) and the same was argued and submitted to the Chancellor September 13, 1956. The demurrer was overruled *March 8, 1957* (R. 135) and answer filed March 12, 1957 (R. 111, 141).

The case was called for trial November 15, 1957 (R. 143), then adjourned to January 3, 1958 (R. 143), submitted January 28, 1958, and a decree entered April 22, 1958 dismissing the bill with costs to be paid by the plaintiffs. (R. 142) Notice of appeal to the Maryland Court of Appeals was filed May 16, 1958 (R. 142), appeal filed June 9, 1958, argued and submitted November 19, 1958, and opinion affirming the decree filed February 13, 1959. The motion for reargument was filed March 11, 1959 and denied March 13, 1959. (R. 139)

The federal questions, review of which are sought herein, were raised in the Maryland Court of Appeals by pleading (appellants' brief), oral argument, and in the motion for reargument (R. 133, 134, 135). All questions

were denied by the Court of Appeals of Maryland (R. 138).

ARGUMENT

ARGUMENT NO. 1:

The Constitution of the State of Maryland provides:

> "The judges of the respective circuit courts of this State and of the courts of Baltimore City, shall render their decisions in all cases argued before them, or submitted for their judgment, within two months after the same shall have been so argued or submitted."
>
> Article IV, Section 23, Constitution, State of Maryland.

The Maryland Rules of Procedure provide:

> "A judge shall render his decision in an action argued before him, or submitted for his judgment, within two months after the same shall have been so argued or submitted."
>
> Rule 18(b), Maryland Rules of Procedure.

The record discloses that the Chancellor on March 8, 1957, filed an opinion and order overruling the demurrer to the amended bill, filed April 5, 1956, but oddly does not show the demurrer was argued and submitted September 13, 1956, six months later, lacking one week; and, further, the Chancellor issued a decree April 21, 1958, in the case submitted January 28, 1958, three months later, lacking one week.

This rule of court has the force and effect of statute and the delays, by the judge of the Circuit Court for Montgomery County, are obvious violations of both the Constitution of the State and the Maryland Rules of Procedure, and a denial of the due process of law guaranteed citizens by the Constitution of the State of Maryland and the Fourteenth Amendment to the Constitution of the United States.

The Maryland Court of Appeals affirmed the decree of the Chancellor, however, making no reference to petitioners' contentions relative to the inordinate delays, and by such omission, violated the rules of procedure which it, under authority of an enabling statute, had prescribed for the regulation of judicial proceedings, and likewise violated other provisions of the State Constitution referred to *supra*.

ARGUMENT NO. 2:

The Maryland Rules of Procedure provide:

> "Where it shall appear that the plaintiff is or may be entitled to some relief or remedy, but not in the particular court, or on the side of the court in which the action is brought or the relief is prayed, the plaintiff shall not on that account be non-suited of the action dismissed; * * *"
>
> Rule 515(a), Maryland Rules of Procedure.

The Chancellor in his decree determined:

> "* * * they (plaintiffs) would be entitled to recover damages against the defendants * * *." (R. 119)

but, contrary to the rule governing the Maryland courts in such circumstances, arbitrarily and discriminatorily dismissed their bill though he was bound by the rule to transfer the action to the law side or, alternatively, under the prayer for general relief to award damages according to the evidence.

> "In a jurisdiction, like Maryland, which has a statute or rule of court, such as Maryland Rule 515, permitting the transfer of actions from equity to law, or vice versa, it is generally erroneous to dismiss the suit absolutely, either on motion of the defendant or on the Chancellor's own motion, merely because the remedy at law is adequate, the usual procedure being to transfer the action to the law side. However, although the Chancellor should not *dismiss* the bill on his own motion he can raise the question himself and then transfer the action."
>
> Moore v. McAllister, 141 A. 2d 176, 184.

The decree that the plaintiffs were entitled to damages requires that they be assessed according to the evidence and a judgment entered therefor. There was no contradiction of the evidence of the expert witness, Joseph Bahen, that it would cost about $10,000 to determine and correct the defects in the house herein involved (R. 42) nor that the expenses to date of trial, totaled $3,767.74.

> "But respondent (plaintiffs) being entitled to relief, is entitled to effective relief and any doubt in respect of the extent thereof must be resolved in its favor * * * and against the petitioner (defendant's) which has shown by its conduct that it is not to be trusted."
>
> Warner & Co. v. Lilly & Co., 265 U.S. 526, 532.

The decree and its affirmance by the Maryland Court of Appeals discriminated against the petitioners in that it deprived them of the protection of the Rule and the law as interpreted by the Court of Appeals of Maryland.

> Moore v. McAllister, supra.

Obviously there is neither equity nor justice in determining that a litigant is entitled to relief and then denying that relief. Equal protection of the laws is a Constitutional right of every American citizen and is essential to the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

> Hanson v. Union Pacific R.R. Co., 71 N.W. 2d 526 (cert. den.).
>
> "The purpose of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States is to protect every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the provisions of a statute or by improper enforcement of a statute."

Rogan v. County Commissioners of Calvert County, 71 A. 2d 47, 57.

Sunday Lake Iron Co. v. Township of Wakefield, 247 U.S. 350, 38 S. Ct. 495, 62 L. Ed. 1154.

Sioux City Bridge Co. v. Dakota County, Nebraska, 260 U.S. 441, 43 S. Ct. 190, 67 L. Ed. 340.

The Maryland Rules of Procedure have the force and effect of a statute, having been enacted by the authority of a statute of the State of Maryland.

ARGUMENT NO. 3:

The Maryland Court of Appeals held that petitioners, by their conduct, had waived the right to demand rescission as they had not acted promptly after discovery of the misrepresentations concerning the open area in the rear of the property (R. 128); that it was not even mentioned in their letter of April 14, 1955 and, therefore, rescission was barred (R. 129); that, "even if the representations which were made as to the foundation walls and basement had been proved to be false, they did not constitute such fraud as would justify rescission" (R. 129); also, that the subsequent discovery that the subsurface water level outside the basement was only one foot below the surface and "that such representations were in fact false, they were material and that the purchasers relied on them to their detriment, it is clear that the Wolins, by their conduct after discovery of such false and fraudulent material representations, elected to ratify the transaction rather than rescind it" (R. 130).

The record is clear that these representations were not discovered until after the letter of April 14, 1955 (Pl. Ex. 47) and that petitioners were without knowledge of these conditions until shortly before April 21, 1955 and thereafter (Pl. Ex. 48), and they therein promptly demanded rescission.

On the contrary the chancellor in his decree specifically held that the letter of April 14, 1955, clearly expressed

and established petitioners' intention and decision to rescind (R. 118, 119).

The failure or refusal of the respondents to make effective performance of their obligations (R. 82, 83, 85, 91) induced petitioners to make an investigation of the representations made by respondent Nathan Goldberg and his exclusive agent, through which investigation the misrepresentations were discovered as to the ownership of the land in the rear (R. 13), and through professional examination by Mr. Joseph Bahen it was found that the thickness of the foundation walls was one-third less than required by the building regulations; that neither the foundation walls nor the basement floor were waterproof; that the use of substandard material and defective workmanship caused the breaking, over a period of time, of numerous floor joists and other structural failures which run from the foundation to the roof, all of which misrepresentations were unknown to petitioners on April 14, 1955, although the representations concerning these matters were the inducements moving petitioners to purchase this particular house.

This Court has often determined that where one is ignorant of facts which would justify rescission of a contract at the time the contract was made or performed, but those facts at a later date become known to the party, he may terminate, rescind or repudiate such a contract.

> "A party to a contract who is sued for its breach may ordinarily defend on the ground that there existed, at the time, a legal excuse for nonperformance by him, although he was then ignorant of the fact.
>
> "He may likewise justify an asserted termination, rescission or repudiation of a contract by proving that there was, at the time, an adequate cause, although it did not become known to him until later."
>
> College Point Boat Corp. v. U. S., 267 U.S. 12, 45 S. Ct. 199, at 200, 69 L. Ed. 490.

The Court of Appeals of Maryland has held to like effect in Piper v. Jenkins, 207 Md. 308, at 315.

> "We hold that a purchaser of land has a right to rely upon representations made to him by the vendor as to its location when the facts concerning which the representations are made are unknown to the purchaser • • •"

It is obvious that petitioners, laymen, without any special knowledge of construction, could not ascertain violations of the Montgomery County building code, a safety regulation; what was beneath a four-inch slab of concrete; that important structural members, six floor joists, would break completely over a period of months; that settlement would occur which caused cracks through which one could envision the inside of a bathroom from a bedroom or vice versa; that ceramic tile floors and concrete bases would both break loose and drop from the original floor level; that what was represented to petitioners to be condensation, or moisture resulting from washing wheelbarrows, would prove to be permanent incursions of substantial quantities of water through basement walls and floor, making the entire basement of the house unhealthy and unusable.

> "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."
>
> Federal Trade Commission v. Standard Education Society, 302 U.S. 112, 116, 58 S. Ct. 113, 82 L. Ed. 141.

The Court of Appeals cited and heavily relied upon the case of Telma v. Gingell, 146 A. 221, 157 Md. 411, 413, 415. That case is not only readily distinguishable from the instant action but the facts and the conduct of the plaintiffs in each case were antithetical.

The Court of Appeals of Maryland has also held that:

> "If the damages that might be awarded would be impossible or difficult to determine, or inadequate, the injured party may invoke the aid of Equity to obtain a rescission."
>
> Vincent v. Palmer, 179 Md. 365, 373, confirming Ady v. Jenkins, 133 Md. 36.

ARGUMENT NO. 4:

The Court of Appeals of Maryland, in deciding this case, found contrary to the ruling of this Court when it declined to presume that the failure of the respondents to call as a witness, or explain the absence of, their exclusive agent Mr. Leo A. Bryer (R. 85) who admittedly conducted the negotiations leading to the signing of the agreement to purchase in this case (R. 94), to testify relative to the uncontradicted testimony of petitioners and two other witnesses, concerning representations made at the time the agreement was entered into, and to presume that the failure so to call or to explain such absence justified the presumption that his testimony would have been unfavorable to the respondents.

> "We recognize that the burden upon the respondent to prove its case by substantial evidence cannot be met by failure * * * to testify or call witnesses in his behalf but his failure to so do creates a presumption that the testimony would have been unfavorable to him. *Local 167* v. *U.S.*, 1934, 291 U. S. 293, 298; *Bowles* v. *Lentin*, 7 Cir., 1945, 151 F. 2d 615, 619."
>
> *Surf Sales Company, et al.* v. *F.T.C.*, 259 F. 2d 744 (C.A. 7, 1958).

ARGUMENT NO. 5:

The petitioners were denied the due process of law guaranteed them by Section 1 of the Fourteenth Amendment to the Constitution of the United States when the Court of Appeals of Maryland decided that the plaintiffs had declined an award of damages. The Chancel-

lor had determined they were entitled to damages but refused to grant damages and failed to transfer the case to the appropriate court as provided by Rule 515(a) of the Maryland Rules of Procedure.

It is settled law that equity having once taken jurisdiction will render complete relief.

Warner & Co. v. Lilly & Co., supra.
Moore v. McAllister, supra.
Corpus Juris Secundum, Volume 88, Trial, Section 24(a), (b).

The record clearly shows the Chancellor merely "suggested to plaintiffs that they bring suit provided they felt they had an adequate remedy at law" (R. 119), though it had already been stipulated by the defendants that the alleged corporation was without assets of any kind (R. 75) and thus any judgment obtained would have been a nullity; that the alleged corporation had held no election of officers or directors, nor directors' meetings, since November 1954 (R. 85, 87); that at law only the alleged corporation could be sued and that at that time it appeared the Statute of Limitations had already run against the institution of a new action by the plaintiffs.

Further, the record discloses that the alleged corporation was owned entirely by Nathan Goldberg and members of his family, who also constituted the officers and board of directors (R. 150, 151, 152).

SUMMATION

Petitioners were denied the equal protection of the laws and deprived of privileges guaranteed them by Section 1 of the Fourteenth Amendment to the Constitution of the United States by reason of the failure or refusal of the courts of Maryland to abide by the provisions of the Constitution of that State and the Rules of Procedure governing the conduct of judicial proceedings. The denial of the equal protection of the laws has been held

by this Court to be "a more explicit safeguard of prohibited unfairness than due process of law" (Bolling v. Sharpe, 1954, 74 S. Ct. 693, 694, 317 U. S. 497, 499, 98 L. Ed. 884, 886); and that "it is a command which the State must respect, the benefits of which every person may demand." (Hill v. State of Texas, 63 S. Ct. 1159, 1162, 316 U.S. 400, 406, 86 L. Ed. 1559, 1563.)

PRAYER

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that court to certify and to send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 81, September Term 1958, Frank Wolin, et al v. Zenith Homes, Inc., et al; and that the said judgment of the Court of Appeals of Maryland may be reversed by this Honorable Court and that your petitioners may have rescission of the contract of sale dated February 10, 1955, cancellation of the deed of March 10, 1955, and a decree awarding the petitioners judgment against the respondents for the purchase price of $22,950 and expenses incurred to date of recoveyance, and such other and further relief as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Respectfully submitted,

FRANK WOLIN
LINDA WOLIN
WALTER J. CAHILL
710 Dupont Circle Bldg.
Washington 6, D. C.

HANSERD K. PRESLEY
927 15th Street, N.W.
Washington 5, D. C.
Counsel for Petitioners

APPENDIX 1A

COURT OF APPEALS OF MARYLAND

Opinion

When Frank and Linda Wolin (the Wolins) became dissatisfied with the newly constructed house they had purchased from Zenith Homes, Inc. (Zenith) they filed, in the Circuit Court for Montgomery County, an action in equity against Zenith and the president of the corporation for rescission of the contract of sale and cancellation of the deed instead of an action at law for damages. The chancellor, finding no fraudulent misrepresentation of a material fact which induced the purchasers to enter into the contract of sale and to accept delivery of the deed, dismissed the bill, and the Wolins appealed.

The contract to purchase the home, then under construction, in Silver Spring, Montgomery County, was executed on February 10, 1955. The signing of the contract followed an inspection of the property, and other houses located in the Carroll Spring Subdivision, over a period of about twenty days. Final settlement for the property was made on March 10, 1955, prior to the date fixed in the contract therefor, and before work on the house had been completed.

During inspections of the house, both before and after the execution of the contract of sale, the Wolins noticed water in the basement. This, they claim, was represented to them at different times by the agents or officers of the owner as "condensation", the result of washing wheelbarrows, and because the lot on which the house was being constructed had not been graded. While the reason therefor was not stated, certain "further conditions" were appended to the contract of sale, including a guarantee that the basement would not leak within a period of

one year from the date of final settlement. And, at the time of settlement, the Wolins demanded, and received, a "supplemental agreement" in the form of a letter from Zenith in which it was stated that Zenith, for the period of one year, "in consideration of * * * [the] purchase of * * * [the] property," guaranteed, among other things, that the basement would not leak and that, if settling of the house caused structural damage, other than normal plaster cracks and chips, such damage would be repaired.

Shortly after moving into the house, the Wolins began to discover "structural defects." There were numerous other defects, but their chief concern involved the seepage of water into the basement and the settling of the house. When complaints were made to it, Zenith tore up most of the basement floor, put in gravel and drain tile in the soft and porous subsoil beneath the floor and replaced the concrete. Broken floor joists were also replaced and the painting was retouched several times. But the infiltration of water did not cease and other structural defects continued to appear.

On April 14, 1955, the Wolins advised Zenith by registered letter that another contractor, at their request, had inspected the house and had made certain recommendations which they set forth in the letter. The contractor also suggested that the Wolins make an arrangement with Zenith to get out of the house they had purchased and into another on a higher elevation. The letter concluded with a warning that "irrespective of what is done, we are not waiving the provisions of our contract of purchase and the supplemental agreement signed at the time we settled for the house." Zenith continued to do further work on the house. Whether this work was an effort to fulfill the recommendations set forth in the letter of April 14 does not clearly appear. But, when the Wolins—on April 21, 1955—demanded a rescission of the contract and cancellation of the deed, no further effort was made to remedy the defects.

The joint appendix does not disclose when the original suit was filed nor when or why an amended bill was necessary, but in the amended bill to set aside the conveyance, it is alleged that the Wolins had been informed by the agents and officers of Zenith before the contract was executed that the property purchased was owned by Nathan Goldberg; that the contiguous open area in the rear of the property purchased was owned by the State of Maryland and would always remain as an open area; that the house would be completed according to a plan and specifications in structurally sound condition and free of substantial defects; that the subsurface foundation walls were dry and well parged; that a bed of gravel had been placed under the basement floor; that the basement walls were dry and well parged and that the dampness then appearing on the basement walls and floor was "condensation"; and that the dwelling was worth $22,950. It was also alleged in detail, among other things, that the representations as to ownership, the contiguous open area and structural soundness—which the Wolins allege induced them to enter into the contract of purchase and to accept delivery of the deed—were false and fraudulent. Nathan Goldberg, the president and owner of at least a controlling interest in Zenith, was joined as a defendant on the ground that he had been represented, and had represented himself, as being the owner of the property and as being responsible for defective workmanship. The Wolins also claimed, as they alleged in the bill, that Zenith was dissipating its assets, that the corporation was defunct and that its president had dealt with the corporate property as if it were his own. The prayers for relief sought rescission of the contract, cancellation of the deed and a return of the purchase price and expenses in connection with the transaction.

The chancellor, having overruled the defendants' demurrer to the amended bill, heard the case on its merits

and dismissed the bill because he found the Wolins were not entitled to rescission of the contract on the grounds of fraud and misrepresentation. He was of the opinion, however, that the Wolins were entitled to recover damages against the defendants for the defective workmanship under the guarantees set forth in the supplemental agreement. But, when he suggested a suit at law for that purpose, or that he would—if and when an appropriate amendment was made—consider the question of damages under the prayer for general relief, he was advised that the Wolins wished to stand on their bill for rescission. Thereupon, the chancellor dismissed the bill. No provision was made in the decretal order for damages in lieu of rescission should the Wolins subsequently change their minds, which they have done on this appeal. Having declined to accept an award of damages in the lower court they cannot revive their claim therefor here.

At the hearing before the chancellor, and on this appeal, it appears that the Wolins, through indifference or otherwise, may have abandoned all of the alleged misrepresentations set forth in the bill except those concerning (i) ownership of the property, (ii) the contiguous open area and (iii) the structural unsoundness of the foundation walls and basement. Even if such other alleged misrepresentations had been vigorously pressed they would furnish no ground for relief. There was no reference in the original contract of sale to a plan or specifications to be followed by the builder nor any suggestion in the evidence that the purchasers had seen or examined any papers of that nature. Moreover, the other representations as to the soundness and value of the house are normally considered in law to be "indefinite generalities of exaggeration" which could deceive no rational person and therefore do not amount to "misrepresentation." See *Milkton* v. *French*, 159 Md. 126, 136, 150 Atl. 28 (1930). Cf. Pomeroy *Equity Jurisprudence* § 878

(5th ed. 1941). Thus, it is clear, we think, that the question before us does not involve the quality *rel non* of the construction of the house, but simply whether the extraordinary powers of equity may be invoked to rescind the executed contract because one or more of the misrepresentations—which the Wolins still claim they relied on—induced them to enter into the contract to buy.

(i). Representation as to Ownership.

The chancellor found that the Wolins did not rely on the representation that Nathan Goldberg (Goldberg) was the owner of the property. We agree. The Wolins asserted that, while Zenith was the purported owner, it was represented to them that the corporation was a mere "front" and that Goldberg would "take care of everything." They had heard of "collapsible" corporations and insist they would not have entered into the contract without assurances that Goldberg would be personally responsible for structural defects. Even if we assume, without deciding, that such representation was not required to be in writing as a promise to answer for the debt or default of another and further that the negotiations on this point were not merged in the supplemental agreement,[1] the Wolins testified that certain repair work had been done under Goldberg's supervision in response to their complaints and was still in progress when they demanded a rescission of the whole transaction. Such conduct precluded an inference that the representation that Goldberg would be personally responsible for structural defects was false. It is also significant, we think, that the letters sent by the Wolins to the owner were addressed to the corporation or to the officers thereof instead of to Goldberg as an individual. Under such circumstances it is unbelievable that the Wolins relied

[1] Cf. *Wagner* v. *Bing*, 163 Md. 496, 163 Atl. 199 (1932).

on the representation that Goldberg was the owner of the premises conveyed when the contract of sale, the deed and the supplemental agreement all showed that Zenith was the owner and the contracting party. *Clark* v. *Kirsner*, 196 Md. 52, 74 A.2d 830 (1950). Cf. *Ace Development Co.* v. *Harrison*, 196 Md. 357, 76 A.2d 566 (1950).

(ii). Representation as to Contiguous Open Area.

Depending upon the circumstances in each case, a purchaser does have a right to rely on at least some representations made by a seller or his agent as to the nature or condition of surrounding properties, even though an examination of public land records would have disclosed that the representations were false. Cf. *The Glendale Corp.* v. *Crawford*, 207 Md. 148, 114 A.2d 33 (1955); *Lake* v. *Thompson*, 366 Pa. 352, 77 A.2d 364 (1951); Annotation, 33 A.L.R. 853 (1924). However, any misrepresentation as to the ownership of the contiguous open area in the rear of the property in this instance, when discovered, was not acted upon promptly, and was in fact waived by the conduct of the purchasers. See the discussion hereinafter set forth in part (iii) of this opinion with respect to another alleged representation. When the Wolins, after moving in, "started having trouble with the house," and also ascertained that the open area in the rear was not owned by the State or County, they did not call the attention of either Zenith or Goldberg to the misrepresentation, and, significantly, they neglected to even mention it in the letter of April 14, 1955, in which they set forth in detail their grievances as to the structural defects of which they complained. And, instead of claiming a prompt rescission for this misrepresentation as soon as it was discovered—as they should have done—they demanded only that Zenith make good its guarantees under the supplemental agreement. In so doing, we hold their conduct constituted a waiver

which bars a rescission for any misrepresentation as to the contiguous open area. See *Telma* v. *Gingell, infra.*

(iii). Representations as to Structural Soundness.

The chancellor found that the purchasers, having inspected the house several times, both before and after its purchase, prior to the acceptance and delivery of the deed, were aware of the conditions found, and that, even if the representations which were made as to the foundation walls and basement had been proved to be false, they did not constitute such fraud as would justify rescission. We find it unnecessary to either agree or disagree with the finding of the chancellor. We will affirm for another reason.

The Wolins contend that they were not so much misled by the general assurances as to the structural stability of the foundation walls and the ultimate dry condition of the basement walls and floor as by the positive statements that the foundation walls were free of substantial defects and that there was a bed of gravel under the concrete floor. Subsequently it was discovered that the foundation walls were only eight inches thick instead of twelve inches as was required by the county building code, and that there was no gravel under the basement floor. The Wolins insist that these specific misrepresentations were ones which they could not have ascertained prior to the execution of the contract of sale and the delivery of the deed. Apparently the unlawful width of the foundation walls had not been discovered by the building inspector who had made ten inspections and finally approved the construction prior to the settlement date. It was also subsequently discovered that the subsurface water level outside the basement was only one foot below the surface and that the house had been built in a swamp. However, even if we assume, without deciding, that such misrepresentations were in fact false, that they were material and

that the purchasers relied on them to their detriment it is clear that the Wolins, by their conduct after the discovery of such false and fraudulent material representations, elected to ratify the transaction rather than rescind it.

In this State, as well as in other jurisdictions, it is settled that when a party to a contract discovers a fraud has been perpetrated upon him, he is put to a prompt election to rescind the contract or to ratify it and claim damages. 5 *Williston Contracts* § 1528 (Rev. ed. 1937); 11 *Restatement of Contracts* §§ 483, 484 (1932); *Sommers* v. *Dukes*, 208 Md. 386, 118 A.2d 660 (1955); *Ortel* v. *Realty Company*, 171 Md. 678, 190 Atl. 239 (1937); *Telma* v. *Gingell*, 157 Md. 411, 146 Atl. 221 (1929); *Groff* v. *Hansell*, 33 Md. 161 (1870). Acts by a purchaser which constitute acquiescence, ratification or estoppel will preclude him from rescinding the contract. See *Hoffman* v. *Seth*, 207 Md. 234, 114 A. 2d 58 (1955). In the *Telma* case we said at p. 413:

> "Upon the discovery * * * of the fraudulent misrepresentations, the purchaser had to elect between two rights. He was put to the choice of repudiating or ratifying the conveyance, although the transaction had been fully completed by conveyance and payment. If he adopted the first alternative he repudiated the conveyance and sought its rescission and a restoration of his situation before the contract; but if he chose the second, he ratified the grant but could obtain damages to redress the injury inflicted by the false and fraudulent representation. These rights were inconsistent and mutually exclusive, and the discovery put the purchaser to a prompt election."

It seems that in some instances even silence may indicate ratification. *Latrobe* v. *Dietrich*, 114 Md. 8, 78 Atl. 983 (1910); *Clements* v. *Smith*, 9 Gill 156 (1850). Cf. *Kandalis* v. *Paul Pet Constr. Co.*, 210 Md. 319, 123 A. 2d 345 (1956).

In a case such as this where the purchasers, instead of exercising the right to rescind the contract promptly upon the discovery of false and fraudulent misrepresentations, notified the seller they were not waiving the provisions of the contract of purchase and supplemental agreement, demanded that the seller make certain repairs and then accepted such repairs as had been made, it is clear the purchasers expressly elected to enforce the contract and supplemental agreement, and could not thereafter repudiate the transaction even though they should afterwards discover other circumstances connected with the same false and fraudulent misrepresentations. *Latrobe v. Dietrich, supra.* As we said in the *Telma* case, *supra*, at p. 415: "The acts were deliberately done and had but one significance, and, so, without reference to the vendee's actual intention to choose, an election resulted which was final. The law does not permit a mental reservation to qualify unequivocal acts, which imply a final choice and affirmation." See also Restatement § 484, *supra*, Illustrations 1 and 8.

For the reasons assigned, we think it is clear that the decretal order of the chancellor dismissing the bill must be affirmed.

Decree Affirmed, the Appellants to Pay the Costs.